



THE FOSSAT[T] CURSE

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WAS IT CHARLES FOSSAT or Charles Fossatt who was opposed to the United States in a California land grant case¹ that made several visits to the U.S. Supreme Court in the late 1850s and early 1860s? The case itself is not very interesting, nor does it involve any particularly interesting doctrines or people or places.² The handling of Charles's name, however, is both (a) entertaining in its own right and (b) an instructive reminder that even the most authoritative of sources may be less accurate than they are authoritative. Indeed, Charles's name seems to have been cursed by authoritative inconsistency from the mid-19th century right down to modern times. Even the most respectable sources of answers about cases and their captioning in the Supreme Court – the *U.S. Reports* themselves,³ Stern & Gressman's *Supreme Court Practice*, and Ashmore's *Dates of Supreme Court Decisions and Arguments, United States Reports Volumes 2-107 (1791-1882)* –

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¹ See *United States v. Fossat*, 25 F. Cas. 1157 (C.C.N.D. Cal. 1857).

² Cf. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. Chi. L. Rev. 466, 468 (1983); see also Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. Chi. L. Rev. 481 (1983) (footnote 4).

³ Supreme Court decisions do sometimes change even after they are released. So it might be possible that the early errors which are primarily spelling inconsistencies can still be corrected via formal errata sheets. See Lazarus, *(Non) Finality of Supreme Court Decisions*, 128 Harv. L. Rev. 540 (2014).

have not agreed with each other, or sometimes even with themselves, about the proper spelling of Charles's last name. This short paper seeks to sweep the whole mess into one convenient pile.

THE SPELLING CURSE

The *Fossat[t]* case involved a land grant in California that included the Almaden Quicksilver mine. The case went to the Supreme Court three times, and was reported as follows:

United States v. Fossat, 61 U.S. (20 How.) 413 (1858) (hereafter “*Fossat[t]-1*”);

United States v. Fossatt, 62 U.S. (21 How.) 445 (1859) (hereafter “*Fossat[t]-2*”); and,

The Fossat or Quicksilver Mine Case, 69 U.S. (2 Wall.) 649 (1864) (hereafter “*Fossat[t]-3*”).⁴

As you can see above, the curse first revealed itself through Benjamin Chew Howard, Supreme Court reporter of decisions, who spelled Charles's name two different ways: “Fossat” in *20 Howard*, but “Fossatt” in *21 Howard*.

I do not know why Howard changed his mind in *21 Howard*, and added a second “t.” If you look at the minutes in the Supreme Court's journal (kept by Clerk of the Court William Carroll) for the December 1857 and December 1858 terms – when the *Fossat[t]* arguments that appear in *Howard's Reports* occurred – Charles's name is consistently spelled with one “t.”⁵ And for all of the motions and arguments prior to the decisions in *Fossat[t]-1* and *Fossat[t]-2* that are annotated in the Court's journal, Charles's name is also spelled with a single terminal “t.” The same is true in the Court's docket book.

⁴ The case appearing in 61 U.S. will be intermittently referred to as *Fossat[t]-1*, the case in 62 U.S. as *Fossat[t]-2*, and the case in 69 U.S. as *Fossat[t]-3*. Why intermittently will be made clear by context.

⁵ There are microfiche copies of the journal in the National Archives in Washington D.C.

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If Howard's inconsistency was not the Clerk of the Court's fault, perhaps it was the fault of the parties' attorneys. In the record for *Fossat[t]-2*, neither party consistently spells Charles's name the same way. For example, on page 28 of the record, his name appears twice, with two different spellings. Maybe Howard read the inconsistencies in the record, noted his prior spelling, and just wanted to cover all of the bases the second time the case reached the Supreme Court.

Regardless of why Howard was inconsistent between *Fossat[t]-1* and *Fossat[t]-2* – whether it was a scrivener's error or a change of heart – he did not return to one “t” when reporting citations to *Fossat[t]-1* and *Fossat[t]-2* in other later cases. For example, in *United States v. Heirs of Berreyesa*,⁶ the Court cites *Fossat[t]-1* (the case in 20 Howard in which Howard spelled Charles's name with one “t”), but Howard reports it as “United States v. Fossatt, 20 Howard.” In other words, in volume 23 of his *Reports*, Howard changed – without notice or explanation – the name of a case he had reported in volume 20 of his *Reports*.⁷

Further complicating matters, John William Wallace, Howard's successor as the Court's reporter of decisions, goes back to spelling Charles's name with one “t” in *Fossat[t]-3*. Wallace not only had to deal with Howard's inconsistencies, but, as the record for *Fossat[t]-3* shows, he also had to deal with a lack of consensus between the attorneys for each side. In the record for *Fossat[t]-3*, and from one brief to another, counsel for both sides were once again spelling Charles's name “Fossat” in one filing, but “Fossatt” in another, *passim*.

And then Wallace goes further. He tries to bring some consistency to the spelling of the name in his cites to past reporters. In a footnote in *Fossat[t]-3* at 704, Wallace cites to “United States v. Fossat, 20 Howard, 413; Same v. Same, 21 Id. 445” [sic].⁸ Then, two pages later, he makes explicit what is implicit in “Same v. Same,” and cites to “United States v. Fossat, 21 Howard, 445.”⁹ The problem with this cite is that Charles's name is

⁶ 64 U.S. (23 How.) 499, 500 (1860).

⁷ “United States v. Fossatt, 20 Howard” is a quote from 23 Howard. So, the style of the cite is identical to the style used in Howard's actual reporter, rather than matching the style of the “real” citations used throughout the rest of this paper.

⁸ 69 U.S. (2 Wall.) at 704.

⁹ *Id.* at 706

spelled “Fossatt” in *21 Howard*. This is probably not a spelling error, but an editorial decision made in an ultimately futile pursuit for consistency. It was not a decision that thrived.¹⁰

Finally, unofficial reporters have also perpetuated the Fossat[t] curse, and in their own special way. The “Cases Reported” index in the 17th volume of the *United States Supreme Court Reports, Lawyer’s Edition* features two spellings of Charles’s name in reference to the same case: *Fossat[t]*-3. On page vi, the case name is given as “Fossat v. U.S.” On page viii, it is given as “Fossatt v.”

TYPOS AND EMPTY SPACES

Over the course of the century-plus since Howard and Wallace reported the work of the Supreme Court (and the names of the parties that appeared before it), the Fossat[t] curse appears to have evolved, like a virus. Moving from spelling inconsistencies in party names, the curse changed course in the 20th and 21st centuries to affecting citation inaccuracies. Shifting targets from the main game, officially reported U.S. law, the curse found new victims in respected and well-known scholarly treatises.

For example, the dates for the Supreme Court cases that are cited in this paper are all drawn from Anne Ashmore’s 2006 publication, *Dates of Supreme Court Decisions and Arguments, United States Reports Volumes 2-107 (1791-1882)*.¹¹ Though Ashmore’s *Dates* is otherwise admirable, her *Dates* too suffers from the Fossat[t] curse. On page 70, Ashmore places the oral arguments for *Fossat[t]*-1 in 1958, one hundred years after the year in which the case was actually decided.¹²

¹⁰ Westlaw and LexisNexis on their websites preserve Wallace’s incorrect spelling of Fossat[t] in his cite to 21 How 445. The Lawyer’s Edition does so as well in 17 L.Ed. 745. Nonetheless, the Lawyer’s Edition, Westlaw, and LexisNexis also preserve the correct spelling inconsistencies between all three of the reported *Fossat[t]* opinions when reporting the original cases, thus rejecting Wallace’s revisionist ways.

¹¹ Excepting those dates found in this paper’s quotations of incorrect cites from the 6th through 10th editions of Stern & Gressman’s *Supreme Court Practice*, *infra*.

¹² There is no case that went before the Supreme Court in 1958 in which the name of a party was Fossat[t]. See *United States Reports*, vols. 355-360.

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And then there is Stern and Gressman's *Supreme Court Practice*, one of the two great treatises dedicated to practice at the high court.¹³ (It is still commonly called "*Stern & Gressman*" even though it has been under new authorship for several years.) The most recent edition (the tenth) of *Stern & Gressman* cites "*United States v. Fossatt*, 61 U.S. (20 How.) 445, 446 (1858)" in its discussion of the functions of the writ of mandamus. It then purports to quote the Court's opinion in that case for the proposition that "mandamus is the only proper remedy available to a party who has prevailed in the Supreme Court where the lower court . . . 'does not proceed to execute the mandate, or disobeys and mistakes its meaning.'" ¹⁴ However, this quote appears nowhere in *20 Howard*. The quote is actually from *United States v. Fossatt*, 62 U.S. (21 How.) 445, 446 (1859).

When they first appeared together in *Stern & Gressman* – on page 631 of the fifth edition, published in 1978 – both the quote and the cite are right. It was in the sixth edition, published in 1986, that the Fossat[t] curse reared its ugly head, in the form of the odd, and incorrect (both as to the reporter volume the quote appears in and as to its date), cite to "*United States v. Fossatt*, 20 How. 445, 446 (1858)." The same error recurred in the seventh and eighth editions. In the ninth edition, the "20 How." and "(1858)" errors were compounded by the addition of an incorrect cite to volume 61 of the *U.S. Reports*.¹⁵ Thus, the current tenth edition of *Stern & Gressman* is merely the latest in a long line of *Stern & Gressmans* to suffer from the Fossat[t] curse.

¹³ The other is Bennett Boskey's *West's Federal Forms, Supreme Court* (1998 & supps.). See *Supreme Credit*, 6 Green Bag 2d 120 (2003).

¹⁴ Geller et al., *Supreme Court Practice* 665 (10th ed. 2014).

¹⁵ *Nota bene*: Two things: (1) When Mr. Kenneth S. Geller was added to the list of named editors in the 7th edition, there was no effect on the error, positive or negative. (2) Something odd about this 9th edition is that when *Supreme Court Practice* began citing to the *U.S. Reports*, it did so at the same time it added a second named editor who had served as a Supreme Court Clerk. This leads one to believe that the curse's effect here might not be the compounding of the error with a cite to the incorrect volume of the *U.S. Reports*, but that a cite to the *U.S. Reports* was added at all.

BACK TO THE *DATES*

On page 631 of *Stern & Gressman* (5th) you find the following text associated with and quoted from *United States v. Fossatt*, 62 U.S. (21 How.) 445, 446 (1859):

Indeed, the Court has indicated that mandamus is the only proper remedy available to a party who has prevailed in the Supreme Court where the lower court, in the words of *United States v. Fossatt*, 21 How. 445, 446, “does not proceed to execute the mandate, or disobeys and mistakes its meaning.”

Excepting the correct citation, *Stern & Gressman* (6th) uses the exact same language at page 501; *Stern & Gressman* (7th) at 949; *Stern & Gressman* (8th) at 585; *Stern & Gressman* (9th) at 655; and *Stern & Gressman* (10th) at 665.

This quoted text refers to an opinion that Chief Justice Roger Taney gave in response to a motion to move *Fossat[t]-2* higher up on the Supreme Court’s docket. It is the first of two opinions that can be cited to by using the cite *United States v. Fossatt*, 62 U.S. (21 How.) 445 (1859). The second opinion of the court is written by Justice John Campbell, and this second opinion of the court is on a motion to dismiss the appeal because the judgment below was not final. You will find the opinion written by Campbell beginning on the same page as the one written by Taney: 446. For the rest of this paper, we will call Taney’s opinion *Fossat[t]-2a*, and Campbell’s opinion *Fossat[t]-2b*.

In *Fossat[t]-2a*, Taney denies the motion to take the case out of turn, and gives a preview of Campbell’s opinion when he suggests that this appeal is not appropriate given that there was no final decision in the court below.¹⁶ Taney then indicates exactly what *Stern & Gressman* says he indicates, that mandamus may be appropriate where the lower court “does not proceed to execute the mandate, or disobeys and mistakes its meaning.”¹⁷ He then schedules oral argument for 7 March 1859.

Why is this relevant?

¹⁶ *United States v. Fossatt*, 62 U.S. (21 How.) 445, 446 (1859).

¹⁷ *Id.*

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It is relevant because Ashmore's *Dates* only contains dates for the oral arguments on appellee's motion to dismiss that took place on 7-8 March 1859.¹⁸ It does not provide any dates for oral argument on the motion to take up the case out of turn that led to the Court's first opinion in *Fossat[t]-2: Fossat[t]-2a*. And *Dates* only provides the date of the final decision in the case, 11 March 1859, not for the decision on the motion to take *Fossat[t]-2* up out of turn, a decision that resulted in a reported opinion, *Fossat[t]-2a*, that has been cited in every edition of *Stern & Gressman* since the fifth.

It might be assumed by a casual reader that this motion to have *Fossat[t]-2* taken out of turn was decided on the briefs, hence the one date *Dates*. After all, Rule No. 6 of the *Rules of the Supreme Court of the United States, Revised and Corrected at December Term, 1858* says: "All motions hereafter made to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion."¹⁹ But the Supreme Court at the time did have a motions day, the procedure for which was generally laid out by Rule No. 27 in the same version of the rules.²⁰ And 21 How. at 445 *explicitly* says:

This motion was argued by *Mr. Bayard* and *Mr. Nelson* in favor of it, and by *Mr. Black* against it. *Mr. Black* (Attorney General) remarked that he could not say that the public business of the Government was obstructed in consequence of the pendency of this appeal.

This means that there are two sets of dates when oral argument was heard for *United States v. Fossatt*, 62 U.S. (21 How.) 445 (1859), arguments that led to two distinct reported opinions given on two distinct days.

The resolution to this conundrum is in the National Archives, where there are, in fact, two sets of arguments recorded in the Supreme Court's journal, one for each of the two opinions given by the court in *Fossat[t]-2*.²¹

¹⁸ Ashmore, page 72.

¹⁹ 62 U.S. (21 How.) VI.

²⁰ *Id.*, XV.

²¹ For copies of the pertinent pages from the journal and docket see the Appendix.

In *Dates*, Ashmore lists 7-8 March 1859 for oral argument in *Fossat[t]-2*, when the Court was considering the motion to dismiss. The result was the Court's second opinion, by Campbell, *Fossat[t]-2b*. The first oral argument in the case – the one that led to the Court's first opinion, by Taney, *Fossat[t]-2a* – took place on 25 February 1859, and the resulting opinion was issued on 28 February 1859. So, it is *Fossat[t]-2a* that has been quoted in *Stern & Gressman* since 1978, and it is for *Fossat[t]-2a* that *Dates* does not include dates for the oral argument or the opinion.

It might also be assumed by a casual reader that this is much ado about not very much, since *Dates* is devoted to opinions by the full Court and not to mere decisions on motions delivered by individual Justices sitting in chambers or on circuit. But that is not the case in the case of *Fossat[t]-2a*. It is described in *21 Howard* as an “opinion of the court” delivered by Taney, just as *Fossat[t]-2b* is an “opinion of the court” delivered by Campbell.²² Both *Fossat[t]-2a* and *Fossat[t]-2b* were, then, real opinions of the Supreme Court. And today, *Fossat[t]-2a* – the opinion delivered by Taney on the motion to expedite – is, if anything, practically more real than Campbell's opinion *Fossat[t]-2b* on the merits. And not only because it is *Fossat[t]-2a* that is quoted in *Stern & Gressman*, but also, and even more significantly, because the Supreme Court itself relied on it in 1978 in *Vendo Co. v. Lektro-Vend Corp.*²³ If the Supreme Court thinks *Fossat[t]-2a* is good law, then perhaps we all should too.

CONCLUSION

All in all, none of this is particularly important. For example, a variety of searches on Westlaw, LexisNexis, and Bloomberg Law turned up no instances where the wrong *Fossat[t]* case or cite as found in *Stern & Gressman* was used in a brief. But *Stern & Gressman* is an industry standard, and Ashmore's *Dates* – an invaluable resource that is justly treasured by knowledgeable practitioners – can be found on the Supreme Court's official website.²⁴ And, it must be emphasized that when *Stern & Gressman's*

²² 62 U.S. at 446.

²³ 434 U.S. 425, 427 (1978). See also *Metcalf v. City of Watertown*, 68 F. 859, 861 (1895); *Delgado v. Chavez*, 5 N.M. 646 (1891).

²⁴ www.supremecourt.gov/opinions/datesofdecisions.pdf.

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protégés switched from citing just to the original reporter to citing to the *U.S. Reports*, they carried the error over and cited to the wrong *U.S. Reports* volume as well.

In sum, we have two well-known Supreme Court practice resources that are suffering from the Fossat[t] curse and may need to be exorcised. They contain longstanding errors involving cases that deal with an important, though extraordinary, area of Supreme Court practice. It is harmless error, but error nonetheless.²⁵



²⁵ I figured “harmless error, but error nonetheless” was too catchy to be totally new. So, to avoid cries of plagiarism, I searched for “harmless error, but error nonetheless.” This phrase appears to have entered into the august body of U.S. law by way of the Fourth Circuit in 2013 in *U.S. v. Greene*, 704 F.3d 298, 311 (4th Cir. 2013). But the earliest instance of the phrase that I can find is in *U.S. v. Yearby*, 136 Fed.Appx. 254 (11th Cir. 2005) (unpublished), in footnote 11 of the appellee brief.

APPENDIX

EXCERPTS OF THE U.S. SUPREME COURT DOCKET AND JOURNAL

3956.		December Term 1858.	
Johnson	The United States	Appeal from	
3783	vs.	District Court	
Bayard, Bayard & Co. (Plaintiffs)	Charles Fouat	St. California.	
1858 Dec: 11	Record received and filed.		
1859 Feb: 16	Motion of Mr Bayard to dismiss re filed.		
1859 Feb: 25	Leave granted Mr Bayard to withdraw Motion.		
1859 Feb: 25	Motion of Mr Bayard to fix time for argument.		
1859 Feb: 28	Motion overruled. And question of final decree ordered for Monday 7 th proximo.		
1859 Mar: 7	Argument commenced.		
1859 Mar: 8	Argument concluded.		
1859 Mar: 11	Decreed that Appeal be dismissed and case remanded.		
1859 Mar: 31	Mandate issued to Mr Eldridge.		

	Friday, February 18 th 1839. Continued		11337
	of Minnesota. Whereupon this Court not being now here sufficiently advised of and concerning what order to make in the premises took time to consider.		
	John H. Service. Appt	McKeefer of coun.	
177 # 1827	vs	et for the respondent	
	William B. Marshall Esq.	moved the Court to	
		renew the records	
	in this case directed to the Supreme Court of the Territory of Minnesota and to send the same directed runs for sale, to the District Court of the United States for the District of Minnesota. Whereupon this Court not being now here sufficiently advised of and concerning what order to make in the premises took time to consider.		
202	The United States	On the motion of Mr.	
	vs	Appts Bayard is is a new	
	Leharis Fossat	ordered by the Court	
		that his motion to	
	dismiss this cause filed on the 16 th instant be and the same is hereby set down for argument on next Friday the 25 th instant		

11330

Friday, February 25th 1859. Continued.

242. The United States vs. App'ts. Mr. Bayard of Charles Fossat. counsel for the App'ts. he now here moved the Court for leave to withdraw the motion to dismiss this case filed by him on the 16th instant - On consideration whereof, it is now here ordered by the Court that leave be and the same is hereby granted him and the same is accordingly withdrawn.

242. The United States vs. App'ts. Mr. Bayard of counsel for the appellees Charles Fossat. moved the court to order this case for argument on a day certain during the present term for the reasons set forth in his written motion filed this date, which was supported by himself and Mr. Nelson in argument, and opposed by Mr. Attorney General Black - Whereupon this Court not being now here sufficiently advised of and concerning what order to make in the premises took time to consider.

11238

Monday, February 28th 1859. Continued.

<p>242 The United States. vs. Appell Charles Fossat.</p>	<p>On consideration of motion, to set this case down for argument on a particular day, made by Mr Bayard on a prior day of the present term, to wit, on Friday the 25th instant and of the arguments thereupon, had as well in support of as against the same motion. It is now here ordered by the Court that said motion be and the same is hereby overruled. But whether the decree of the District Court appealed from by the United States in this case is a final decree or not is a question on which this Court desire to hear further arguments; and it is therefore now here ordered by this Court that counsel be heard on this question on this day week the 7th proximo.</p>
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<p>229 John C. Almy, Jr. vs. Plaintiff The People of the State of California.</p>	<p>Mr Howard having applied by letter for leave to withdraw the motion submitted by him last</p>
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